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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS, AND JAMES CASTNER,

Petitioners,

v.

JACOB PERKO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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No.

LOCAL NO. 207, OF INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION, WILLIAM E. THOMAS, HENRY GORGAS, FLOYD BECK, EUGENE ROBERTS, AND JAMES CASTNER,

Petitioners.

v.

JACOB PERKO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on July 5, 1962.

OPINIONS BELOW

The first opinion of the Supreme Court of Ohio, reversing a dismissal for lack of jurisdiction and remanding the case for trial, is reported at 168 Ohio St. 161, 151 N. E. 2d

742 (1958), and is also reproduced in Appendix A to this Petition.

The second opinion of the Supreme Court of Ohio, reversing a judgment for defendants and ordering a new trial, is reported at 171 Ohio St. 68, 167 N.E. 2d 903 (1960), and is reproduced in Appendix B to this Petition.

The opinion of the Court of Appeals of the Seventh Appellate District of Ohio, affirming the judgment for plaintiff entered after the second trial, is not yet officially reported. It is reproduced in Appendix C to this Petition.

The order of the Supreme Court of Ohio dismissing the defendants' appeal as of right for lack of a "debatable constitutional question" is not yet officially reported, but is reported unofficially at 184 N.E. 2d 100 (1962). It is reproduced in Appendix D to this Petition.

JURISDICTION

The final judgment of the Supreme Court of Ohio was entered on July 5, 1962. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1257 (3).[1]

QUESTIONS PRESENTED

Whether the National Labor Relations Act precludes a state court from exercising jurisdiction in an action for damages brought by a union member against his union claiming that the union wrongfully forced his employer to discharge him, and other employers not to hire him, because he had violated a union rule.

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[1] The Supreme Court of Ohio's order dismissing petitioners' appeal as of right on the ground that "no debatable constitutional question exists herein" constitutes a final judgment of that Court which is reviewable by this Court on certiorari. *Tumey* v. *Ohio*, 273 U. S. 510, 515 (1927); Stern and Gressman, *Supreme Court Practice* 79 (2d Ed. 1954).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

Article 6, Clause 2 of the Constitution of the United States provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 2(3) of the National Labor Relations Act, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(3) (1958), states as follows:

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor. . . ."

Section 2(11) of the Act, 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(11) (1958), states as follows:

> "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 7 of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958), states as follows:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958), states in pertinent part as follows:

> "It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act, as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; . . . Provided further, That no employer shall justify any discrimination against an em-

ployee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

Section 8(b) of the Act, 61 Stat. 140 (1947), 29 U.S.C. § 158(b) (1958), states in pertinent part as follows:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ."

Section 10(a) of the Act, 49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1958), states as follows:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. **Provided, That** the Board is empowered by agreement with any agency

of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

STATEMENT

This case comes to this Court after having been through the courts of the State of Ohio three times. In order to understand the nature of the federal questions presented, and the manner in which they were raised below, it is necessary to review the somewhat long and tortuous history of this litigation.

The First Round

On February 8, 1956, the plaintiff, Jacob Perko, filed a petition in the Court of Common Pleas of Mahoning County, Ohio, against Local 207 of the International Association of Bridge, Structural, and Ornamental Iron Workers (hereinafter referred to as the union) and certain of its individual officers, seeking damages under the state common law (R. 99).[2] The petition alleged that for many years the plaintiff had been a member in good standing of the union and had been employed as a "foreman" by the William B. Pollock Company, with whom the union bargained collectively. It further alleged that the defendants, "without justification," conspired to deprive the plaintiff of his right to con-

[2] The Record herein is paginated consecutively except for the transcript of testimony at the trial, which is paginated separately. We will therefore refer to the transcript of testimony as "Tr.", and to the rest of the Record as "R."

tinue to work for that company or "for any other company in the geographic jurisdiction of Local 207," and that, in furtherance of this conspiracy, the defendants first demanded that the Pollock Company discharge the plaintiff from employment, and subsequently "instituted a strike" against the company "for the sole purpose of coercing the William B. Pollock Company into discharging the plaintiff." As a result, according to the petition, plaintiff was discharged from his employment, and prevented from obtaining other employment as either a "foreman" or a "superintendent," all to his financial detriment.

On May 26, 1956, defendants filed an answer (R. 105), and on September 27, 1956, defendants filed a motion to dismiss the petition on the ground that the court lacked jurisdiction over the subject matter (R. 109). A memorandum which was attached as part of the motion asserted two grounds in its support: first, that the conduct alleged to have been engaged in by defendants would, if proved, constitute an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board, and, second, that plaintiff has failed to exhaust the remedies available to him under the union's constitution and by-laws (R. 109). The court, after argument, dismissed the action on the second ground (R. 122), and the plaintiff appealed.

The Ohio Court of Appeals of the Seventh Appellate District affirmed the judgment without opinion (R. 127). The plaintiff then appealed to the Ohio Supreme Court, which reversed the judgment below and remanded the case for trial.

The Supreme Court wrote an opinion (Appendix A) which dealt with both of the defendants' arguments. It first disposed of the ground on which the trial court had relied—plaintiff's failure to exhaust internal union remedies—by holding that plaintiff was not seeking to redress any of his rights as a member of the union, but was seeking to remedy the alleged interference with his employment relationship, a

common law tort, to which no internal union remedies are applicable.

Turning then to the question of federal pre-emption, the court stated the following:

> "Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell*, 356 U. S. 634, 78 S.Ct. 932, 2 L.Ed. 2d 1030 and *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018 (Appendix A, p. 29-30)."

Accordingly, the case was remanded for trial.

The Second Round

On remand, the plaintiff amended his petition by increasing the prayer for damages (R. 133), and the defendants amended their answer by adding as an additional defense the allegation that the conduct alleged to have been engaged in by the defendants was a protected activity under Section 7 of the National Labor Relations Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1958). (R. 136). The case was then tried to a jury. Defendants moved for a directed verdict at the close of plaintiff's case and at the close of the trial, but the court permitted the case to go to the jury. However, the jury was unable to reach a verdict and the court then

granted defendants' motion and directed a verdict in their favor (R. 145).

On appeal, this judgment was affirmed by the Court of Appeals without opinion (R. 150), and the plaintiff then appealed to the Supreme Court a second time.

The Supreme Court again reversed and remanded the case for a second trial. Stating that "the jurisdiction of the trial court to hear this action was determined by this court in its prior decision," the court dealt in depth only with the question of whether the trial court had applied the correct test in determining whether the evidence justified a directed verdict. Three of the judges noted their dissent, but wrote no dissenting opinion. (Appendix B.)

The Third Round

On remand, the case was tried a second time. The evidence established that plaintiff was a member of the defendant union, which represents iron workers in the Youngstown, Ohio area (Tr. 105, 177). He had for many years been employed, either as a "foreman" or as a "superintendent" (Tr. 6), by the William B. Pollock Company, a construction company engaged in interstate commerce (Tr. 15-16).

A "superintendent" is the supervisor of an entire construction project, and under him will work a number of groups of employees, of various crafts, each represented by the appropriate craft union. One member of each such group is designated a "foreman," and has the job of transmitting to the members of his crew the instructions of the superintendent (Tr. 299). The foreman is always a member of the union (Tr. 179), and his wages, while somewhat higher than those of the other crew members, are established by the collective bargaining agreement between his union and the employer (Tr. 141).

Over a period of years, there had been a recurrent dispute between the iron workers and the boilermakers, each claiming the right to perform certain work (Tr. 18-21, 143-

44). As a result of this dispute, the defendant union had adopted a rule forbidding any iron worker "to go in as a boilermaker *or assist them in any way*" (Tr. 193, emphasis added).

In 1953 a dispute arose at a construction project being performed by the William B. Pollock Company, in which it was charged that boilermakers were performing work to which the iron workers were entitled. Plaintiff was employed as a superintendent on that project, and in that capacity he instructed boilermakers in the performance of the disputed work (Tr. 40-41).

Thereupon, on December 4, 1953, plaintiff was charged, within the union, with assisting boilermakers in violation of the union's rule (Tr. 58-59). He was tried, found guilty, fined, and suspended from membership pending payment of the fine (Tr. 58-59). The fine was later suspended by the parent International Union and plaintiff was placed on "probation", and permitted to resume payment of dues (Tr. 115-16).

The jurisdictional dispute eventually erupted into a work stoppage (Tr. 21-22), but shortly thereafter was resolved by an arbitration decision of a "labor management committee" established by agreement between the various building trades unions and the company, awarding some of the work to the iron workers and some to the boilermakers (Tr. 8-9).

According to testimony introduced by plaintiff, members of the defendant union, when they returned to work after the dispute was resolved, informed the Pollock Company that they would no longer take orders from plaintiff, because he had assisted boilermakers (Tr. 9, 14). Plaintiff remained in the company's employ for the remainder of that particular project, but he was never rehired by the company on any subsequent projects (Tr. 11-12).

Plaintiff testified that he attempted to obtain work as a superintendent or foreman several times after this incident, both with Pollock Company (Tr. 78) and with other com-

panies, but that he was unable to do so. He testified that companies would not hire him because of his "problem in the Union" (Tr. 92-94).

The defendants introduced evidence tending to show that the union had never interfered with plaintiff's attempts to obtain or keep employment as a supervisor or foreman;[3] and that, indeed, plaintiff had applied to only two companies for such work in the entire period after 1953: Pollock, and the American Bridge Division of United States Steel Corporation (Tr. 103). Defendants further introduced evidence that plaintiff, who had been 66 years of age when the dispute arose in 1954, had obtained several jobs as a journeyman with construction firms in subsequent years (Tr. 79), but that each year he had "retired" just before his earnings approached the level which would disqualify him for social security benefits (Tr. 98, 185-86, 394-95. See also Tr. 159, 292).

After all evidence and arguments had been presented, the trial judge instructed the jury. He first summarized the essential contentions of the plaintiff as follows:

> "That the Defendant union, its officers and members, conspired to deprive him of his right to continue to work as a foreman for not only the William B. Pollock Company but for any other company in this jurisdiction of the Local; that in furtherance of this that Defendant notified his employer, the William B. Pollock Company, that Plaintiff's foreman's rights had been suspended and demanded without cause that he be discharged from his employment;
>
> "That this company refused to do so and continued to employ him, the plaintiff, as foreman until January 26, 1954; that the Defendants then in the furtherance of their conspiracy to deprive Plaintiff of his right to

[3] Tr. 25-28, 59-61, 100, 152-54, 185, 209-11, 238-39, 253, 272, 283-84, 293, 298, 302-03, 315, 347, 357, 361-62, 365, 373-4, 386-90.

work as foreman or superintendent unlawfully instituted a strike by the members of the Defendant Local against the company on the job being performed at Hubbard, Ohio, for the sole purpose of coercing the William B. Pollock Company to discharge the Plaintiff as a foreman;

"That as a consequence of this he was discharged from his employment by the William *B. Pollock Company* on that date;

"That the Defendant since the time of this discharge without justification prevented plaintiff from procuring employment as a foreman in iron work by representing that he was suspended from the Union; that he, the Plaintiff, was at the time of filing this Petition 68 years of age, and that he had no other means of livelihood; that he had been earning previous to his discharge $15,000 a year and has not been able since to earn more than $1,000 per year . . ." (Tr. 441-442).

The Judge then proceeded to instruct the jury as to the applicable common law, stating, in effect, that if the plaintiff had proved the above contentions by a preponderance of the evidence then he would be entitled to recover damages (Tr. 445).

The Court refused to give the following instruction, requested by the defendants:

"I charge you that it is established law that employees have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for their mutual aid or protection.

"If you find by a preponderance of the evidence that the steward at the Ohio Works job and the other members of the Union refused to take orders from the Plaintiff solely for their mutual aid or protection, then you may not consider this conduct as evidence of a con-

spiracy since such acts are legally protected, and you must find for the Defendant" (Tr. 437).

After extended deliberations which almost ended in another hung jury (Tr. 454-57), the jury reported a verdict for the plaintiff in the amount of $25,000 (R. 155). The court entered judgment accordingly (R. 156), and denied defendants' motion for a Judgment N.O.V. and for a new trial (R. 157, 158).

The Defendants then appealed to the Court of Appeals, raising, *inter alia,* the argument that the decision of this Court in *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236 (1959), which was rendered after the first decision of the Supreme Court of Ohio in the present case, made clear that "whether the conduct [of the union] is permitted by Section 7 or condemned by Section 8 is for the [National Labor Relations] Board and not a Court to decide" (R. 227). Plaintiff, however, argued that *Garmon* in no way affected the correctness of the original decision of the Supreme Court of Ohio (R. 257-260).

The Court affirmed the judgment below, stating with respect to the pre-emption issue only that Section 7 of the National Labor Relations Act does not permit defendants "to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law Action is not eliminated" (Appendix C).

Defendants then appealed to the Supreme Court of Ohio, both by motion for an order directing the Court of Appeals to certify its record, and by invoking the right to appeal as to constitutional questions. The Court, without opinion, denied the motion to certify the record (R. 5), and dismissed the appeal on the ground "that no debatable constitutional question exists herein" (R. 6; Appendix D), notwithstanding the fact that both parties, in their briefs, presented arguments as to whether, in the light of *Garmon,* the original de-

cision of the Supreme Court of Ohio was correct (R. 25-28, 56-61).

Having thus exhausted the available state remedies, defendants now petition this Court for certiorari.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Ohio in this case is in direct conflict with the decision of this Court in the second *Garmon* decision: *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959).[4] In that case, this Court held that a state court is precluded from exercising jurisdiction in an action for damages "when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8." 359 U. S. at 244. The opinion proceeded to explain how this principle is to be applied:

> "At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a

[4] The first *Garmon* decision, *San Diego Building Trades Council* v. *Garmon*, 353 U. S. 26 (1957), reversed a state court injunction and judgment for damages which were based on a finding that the union had engaged in an unfair labor practice, and which were rendered after the NLRB had refused to take jurisdiction of the case. But the Court remanded the case because the original state decision seemed to be based on federal law, and there had thus been no determination by the state court as to whether the damages might have been sustained under the law of the state. This Court, of course, was unable to reach the question whether an action for damages under state law was preempted until the antecedent state-law question was decided by the state courts.

State's power and state jurisdiction too must yield to the exclusive primary competence of the Board. See, *e.g.*, *Garner* v. *Teamsters Union*, 346 U. S. 485, especially at 489-91; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468.

". . . When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

". . . It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. . . . The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." 359 U. S. at 244-46.

The two cases relied on by the Ohio Supreme Court in its first decision in this case, *International Ass'n of Machinists* v. *Gonzales*, 356 U. S. 617 (1958) and *United Automobile Workers* v. *Russell*, 356 U. S. 634 (1958), were specifically distinguished in *Garmon* as representing two narrow exceptions to the general rule. The state court was permitted to exercise jurisdiction in *Russell*, said the Court, even though the conduct involved was also an unfair labor practice, because there was involved "violence and imminent threats to the public order," and in that situation the principle of federal pre-emption must yield to the paramount state interest in maintaining the peace. 359 U. S. at 247-48. And the state court was permitted to exercise jurisdiction in *Gonzales*, even though no violence was involved, because "the activity regulated was a merely peripheral concern of the Labor

Management Relations Act." Id. at 243. This statement referred to the fact that in *Gonzales* the action was for wrongful expulsion from union membership—a matter not directly dealt with in the Act—and the only possible conflict with the jurisdiction of the NLRB resulted from the fact that part of the relief granted by the state court was damages to compensate the plaintiff for the loss of his job, which was found to be a consequence of his expulsion from the union, but which was probably also the result of an unfair labor practice.

Neither of these two narrow exceptions to the basic holding of *Garmon* is applicable here. The wrong which the plaintiff in this case sought to remedy was the alleged action of the union and its agents of inducing his employer to discharge him, and other employers not to hire him. He did not allege any violence, nor did he allege that the union wrongfully expelled him from membership or disciplined him as a member. Indeed the first opinion of the Ohio Supreme Court expressly stated that plaintiff was "not attempting to secure any redress for loss of rights as a member of the union" (App. A, p. 29). And the trial judge specifically charged the jury that "the trial of Jacob Perko by the Executive Board of the Defendant Union . . . was an exercise of a lawful right . . .", and that "the findings and penalty of the Local Union as modified by the International Union cannot be questioned in this court in this proceeding" (Tr. 424).

It follows that neither *Russell* nor *Gonzales*, when read in the light of *Garmon*, sustain the jurisdiction of the state court in this case. Rather that jurisdiction could be sustained only if it were clearly established, by an NLRB determination or by "compelling precedent applied to essentially undisputed facts," that the alleged activities of the union which are the subject of this action are neither prohibited by Section 8 nor protected by Section 7 of the National Labor Relations Act.

The Court below did not even purport to so hold. Rather, the first decision of the Supreme Court of Ohio, which established the law of the case as to jurisdiction, seemed to assume that the union *had* committed an unfair labor practice:

> "The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of an action to recover damages for a common-law tort, *which is also an unfair labor practice proscribed by the act,* as to preclude an appropriate state court from exercising jurisdiction." (Emphasis added).

This holding is flatly contrary to *Garmon.* It was made, of course, prior to *Garmon.* At that time, the notion that actions for damages under state tort law were not preempted, even when the complaint alleged conduct which is (or may be) also an unfair labor practice, had some currency. See, *e.g., Selles* v. *Local 174, International Brotherhood of Teamsters,* 50 Wash. 2d 660, 314 P. 2d 456 (1957), *cert. denied,* 356 U. S. 975 (1958); *International Sound Technicians* v. *Superior Court,* 141 Cal. App. 2d 23, 296 P. 2d 395 (1956). See also 71 Harv. L. Rev. 742 (1958). The first *Garmon* decision of this Court, 353 U. S. 26 (1957), in which the damages issue was remanded to the state court (see note 4, *supra*), tended to give some support to that notion, as did the decisions in *Russell* and *Gonzales,* upon which the Ohio Court relied.

But the second *Garmon* decision was decided prior to the third round of appeals in this case, and was specifically brought to the attention of both the Ohio Court of Appeals and the Ohio Supreme Court by the defendants' counsel. Nevertheless, those courts refused to reconsider the original holding of the Ohio Supreme Court. Thus, unless this Court grants certiorari in this case, the Ohio courts will presumably continue to entertain all damage actions arising out of conduct which is or may be an unfair labor practice.

Moreover, the court below not only applied the wrong standard in determining whether it had jurisdiction in this case, but it reached the wrong result. The conduct which the union allegedly engaged in, and which was the only basis for plaintiff's common law claim, is not only arguably, but probably, an unfair labor practice. The case should therefore have been dismissed for lack of jurisdiction.

The substance of the plaintiff's claim in this case was that, because he violated a union rule, the union, by strike, threats to strike, and other means forced the plaintiff's employer to discharge him from his job as "superintendent" and forced other employers not to hire him, either as a "superintendent" or as a "foreman." If a charge to that effect were proved before the NLRB, it is likely that the union would be found in violation of Section 8(b)(2) and/or Section 8(b)(1)(B) of the Act. 29 U.S.C. §§ 158(b)(2), 158(b)(1)(B).

Section 8(b)(2) provides as follows:

> "It shall be an unfair labor practice for a labor organization or its agents—
>
> * * *
>
> "(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)[8] or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;"

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[8] Section 8(a)(3) of the Act, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1958), states as follows:

> "It shall be an unfair labor practice for an employer—
>
> * * *
>
> "(3) by discrimination in regard to hire or tenure of employment or any term of condition of employment to encourage or discourage membership in any labor organization. . . ."

This Court, in *Radio Officers* v. *NLRB,* 347 U. S. 17, 40 (1954), held that "§§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad or indifferent members, or abstain from joining any union without imperiling their livelihood." On that basis, the Court found a violation of 8(b)(2) where the union induced an employer to deny employment to a union member who had disobeyed a union rule, even though he had not actually lost his union membership, since the purpose of such discrimination was "to encourage members to perform obligations or supposed obligations of membership." *Id.* at 52.

In the light of that decision, the facts alleged by the plaintiff in the present case would be not only arguably but probably a violation of 8(b)(2). The only possible argument to the contrary would be that Section 8(b)(2) is not applicable to this case because both "foremen" and "superintendents" are "supervisors" under the Act, and not "employees" within the meaning of Section 8(b)(2).

From the evidence in the record, however, it appears probable that a "foreman," as that term is used in this case, is an employee within the meaning of the Act. He is covered by the collective agreement (Tr. 141), he is required to be a member of the union (Tr. 52), generally he is chosen at the job site from among the members of the crew (Tr. 362), he may work at the trade along with his crew (Tr. 213, 247), and his supervisory duties are limited to passing along the instructions of the superintendent (Tr. 358). In short, he seems to be what is generally called a group leader or a strawboss—two witnesses used the term "pusher" (Tr. 212, 299)—whose supervisory duties are "merely routine" and do not "require the use of independent judgment," and who is therefore an "employee" rather than a "supervisor" under the Act. §§ 2(3), 2(11), 29 U.S.C., §§ 152(3), 152(11). See, e.g., *International Bh'd of Boilermakers,* 119 NLRB

1605 (1958), *enforced*, 259 F. 2d 957 (D.C. Cir. 1958); *New York Shipping Ass'n*, 116 NLRB 1183 (1956).[6]

But even if "foremen" as well as "superintendents" were deemed to be supervisors, the probability that the union's alleged conduct would be an unfair labor practice would be just as strong—the only difference being that the applicable Section of the Act would be 8(b)(1)(B), rather than 8(b)(2). Section 8(b)(1)(B) reads as follows:

> "(b) It shall be an unfair labor practice for a labor organization or its agents
>
> "(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;"

The purpose of this provision, as stated by Senator Taft, was to prevent a union from "saying to the employer, 'you have to fire Foreman Jones. We do not like Foreman Jones, and therefore you have to fire him, or we will not go to work.'" 2 *Leg. Hist. of Labor-Management Relations Act* 1012. See also *Id.* at 1077. The Senator could not have more precisely stated the plaintiff's allegation in the present case.

Section 8(b)(1)(B) was designed to make supervisors answerable solely to the employer, and to free them from possible restraints from the union. Thus, it has been held

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[6] In the latter case, the Board stated:

> "The Board has had frequent occasion to distinguish between strawbosses or group leaders on the one hand and supervisors on the other, and has found that the fact that strawbosses or group leaders are more experienced, receive slightly higher pay, and transmit routine instructions does not convert their status from employees to supervisor. The testimony in the record, in our opinion, establishes that not only have the hatch bosses never been considered representatives of management, but that, in a real sense, they are more akin to gang representatives. We find, moreover, that whatever direction they give to the men in their gangs is of a routine nature which does not require any appreciable independent judgment, and that they serve as a conduit in the transmission of directions." 116 NLRB at 1187.

to be an unfair labor practice for a union to demand that all supervisors must be union members, even when the union guarantees that it "shall not discipline the foreman for carrying out written instructions of the publisher [employer]." *International Typographical Union*, 123 NLRB 806 (1959), *enforced*, 278 F. 2d 6 (1st Cir. 1960), *affirmed by an equally divided court*, 365 U. S. 705 (1961). *A fortiori* it must follow that the union violates Section 8(b)(1)(B) when it does, in fact, demand the firing of a supervisor,[7] as is alleged in this case, because he obeys the employer rather than his union's rules. *Cf. Radio Officers* v. *NLRB, supra.*

The above discussion, while by no means exhaustive of the subject, should be sufficient to show that the conduct alleged to have been engaged in by the defendants would, if proved, probably constitute an unfair labor practice.[8] It follows that the decision of the Ohio Supreme Court in this case, both in its holding and in its result, was directly contrary to *Garmon.*

We have stressed, throughout the above discussion, that the union's *alleged* conduct, *if proved*, would probably have been an unfair labor practice. We recognize, of course, that

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[7] As the First Circuit noted, supervisors' duties "necessarily" include "participation in the adjustment of grievances" within the meaning of Section 8(b)(1)(B), *International Typographical Union* v. *NLRB*, 278 F. 2d, at 12. See also remarks of Senator Taft, *supra.*

[8] After the Ohio Supreme Court refused to sustain the dismissal of this action on the ground that the alleged conduct of the union was probably an unfair labor practice, the answer was amended to raise the additional defense that the union's conduct was protected under Section 7 (R. 136). This was, of course, the only remaining pre-emption argument which was not foreclosed by the Ohio Supreme Court's first decision. In the light of what we have stated in this petition, the alleged activity of the union, if proved, would probably be prohibited by the Act rather than protected. However, if we are in error in our argument, it would then be strongly arguable that the union's conduct, being for the "mutual aid and protection" of its members and entirely peaceful, would be protected under Section 7. Under *Garmon*, the possibility of this result is also sufficient to preclude state court jurisdiction.

this Court must assume that the plaintiff's allegations were proved, since this is not the appropriate forum in which to review the sufficiency of the evidence.

Nevertheless, it is significant that the factual issues were hotly contested in this case, and that the Ohio courts had great difficulty resolving them. Thus, the jury at the first trial was unable to agree on a verdict, and the trial judge then directed a verdict for defendants which was affirmed by the Ohio Court of Appeals (R. 150). The Ohio Supreme Court reversed, not because it believed that the evidence was sufficient to preclude a directed verdict, but only because it felt that the trial judge had applied the wrong test in weighing the sufficiency of the evidence (Appendix B). At the second trial, the jury almost failed to reach a verdict again (Tr. 454-57), and the Court of Appeals affirmed the verdict finally reached only with obvious reluctance:

> "We agree that with all the testimony, there is very little that supports the cause sued on here. And yet we cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for the plaintiff. Under the ruling in the second *Perko* v. *Union* appeal, 171 Ohio St. 68, to support a directed verdict, the trial court would have had to so find. We are bound by this case" (R. 46; App. C., p. 38).

The closeness of the factual issues in this case dramatizes the importance of having them determined by the expert National Labor Relations Board, rather than by a lay jury. As this Court has stated:

> "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *NLRB*, 324 U. S.

793, 800 (1945). See also *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 488 (1951).

2. The above discussion demonstrates, we believe, that the decision of the Ohio Supreme Court, both in its holding and in its result, directly conflicts with this Court's decision in *Garmon*. This, in itself, is sufficient reason for this Court to grant certiorari and reverse the decision summarily. *Cf. DeVries* v. *Baumgartner's Elec. Const. Co.*, 359 U. S. 498 (1959); *Local Union 429, IBEW* v. *Farnsworth & Chambers Co.*, 353 U. S. 969 (1957); *Teamsters* v. *Kerrigan Iron Works, Inc.*, 353 U. S. 968 (1957).

But there is yet another reason why this case merits the attention of this Court. The basic error committed by the Ohio courts in this case was to misconstrue the decisions of this Court in *Russell* and *Gonzales* as broadly authorizing state courts to assume jurisdiction in any tort action for damages, even though the alleged wrong might also constitute an unfair labor practice. As we pointed out above, this Court made clear in *Garmon* that the state court had been permitted to act in *Russell* only because of the presence of violence in that case, and that the state court had been permitted to act in *Gonzales* only because that case involved a matter of "merely peripheral concern" under the federal Act—wrongful expulsion from union membership. Yet the court in the present case refused to reconsider its original decision even when the *Garmon* decision was specifically brought to its attention.

The Ohio court's apparent failure to comprehend the distinction between *Russell* and *Gonzales* on the one hand, and *Garmon* on the other, is not unique. Several other state court decisions, subsequent to *Garmon*, have manifested a similar lack of understanding of these distinctions.

One such case is *Taylor* v. *Hoisting Engineers Local 101*, 189 Kan. 137, 368 P. 2d 8 (1962). The essence of the complaint in that case was that the union "did willfully, inten-

tionally, and oppressively refuse to permit plaintiff to join said union, and did willfully, intentionally, and oppressively cause plaintiff to be discharged from his said employment because plaintiff was not a member of said union . . ." 368 P. 2d at 10. The National Labor Relations Act, on its face, makes it an unfair labor practice for an employer to discharge an employee who is not a union member, even where there is a valid agreement requiring membership as a condition of employment, if membership was denied the employee for any reason other than for failure to tender dues. § 8(a)(3), 29 U.S.C. § 158(a)(3). Accordingly, it is a violation of 8(b)(2) for a union to cause an employer to discharge an employee in those circumstances. The complaint in the *Taylor* case, therefore, plainly charged the union with an unfair labor practice.

The Supreme Court of Kansas nevertheless refused to dismiss the action for lack of jurisdiction. Although it seemed to rely in part on the "right to work" provision of the state constitution, and on the special status afforded "right to work" laws under Section 14 (b), 29 U.S.C. § 164(b), the court's principal holding appears to be that "plaintiff may still place his right to sue upon the common law of the state." 368 P. 2d at 10. After discussing both *Gonzales* and *Garmon*, the court concluded that the case before it was like *Gonzales*, and that *Garmon* "does not control the instant case." *Id.* at 11. The Court specifically relied on *Selles* v. *Local 174, International Brotherhood of Teamsters*, 50 Wash. 2d 660, 314 P. 2d 456 (1957), which was one of the pre-*Garmon* cases holding broadly that damage actions are not pre-empted.

A similar case is *Willard* v. *Huffman*, 250 N.C. 396, 109 S.E. 2d 233 *cert. denied*, 361 U. S. 893 (1959), in which the claim was that plaintiff had been discharged for refusing to join a union, in violation of the state "right-to-work" law. Here also the decision of the court that it had jurisdiction

was based in part on Section 14(b),[9] but the Court in its opinion did not rely wholly on that ground. As an additional basis for its decision, it stated:

> "In view of what was said in . . . Gonzales . . . . and Russell, supra, relative to the right to recover damages for tortious conduct, irrespective of whether or not such conduct was an unfair labor practice, in our opinion the judgment of the court below should be upheld, and we so hold." 109 S.E. 2d at 243.

This decision was followed in *Keller* v. *Huffman Full Fashioned Mills,* 251 N.C. 92, 110 S.E. 2d 480 (1959).

Another state court case which showed a lack of understanding of the distinction between *Garmon* and *Gonzales* is *Lockridge* v. *Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees,* 369 P. 2d 1006 (Ida. 1962). That was a case like *Gonzales,* and the Court reached what appears to be the correct result that the state court had jurisdiction. But the Court was unable to articulate the distinction between *Gonzales* and *Garmon,* and it finally decided in favor of state jurisdiction on this basis:

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[9] The reliance of the courts in *Willard* and *Taylor* on Section 14(b) appears to be misplaced. Section 14(b) provides that nothing in the Act

> "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

The purpose of this provision was to permit states to prohibit what the Act itself permits—the execution and enforcement of collective agreements requiring union membership as a condition of employment. It was not intended to permit states to prohibit what the act itself prohibits—discrimination against nonmembers in the absence of a valid agreement requiring membership as a condition of employment. Since both *Willard* and *Taylor* involved conduct which was probably an unfair labor practice under the Act, Section 14(b) did not give the courts jurisdiction in those cases. See *Local Union 429, IBEW* v. *Farnsworth & Chambers Co.,* 353 U. S. 969 (1957), *reversing* 201 Tenn. 329, 299 S.W. 2d 8; *DeVries* v. *Baumgartner's Elec. Constr. Co.,* 359 U. S. 498 (1959), *reversing* 77 S.D. 273, 91 N.W. 2d 663.

> "In view of the unsettled state of the federal law, our course is clear. We must assert jurisdiction in every doubtful case, to the end that our citizens be not denied relief for wrongs 'neither protected nor prohibited' nor 'pre-empted' by federal law, or, more appropriately, the National Labor Relations Board," 369 P. 2d at 1010.

The Pennsylvania Supreme Court, on the other hand, seems to have taken the view that *Garmon* has virtually overruled *Gonzales* as to the right to recover damages for loss of employment even when the action is based on the allegation of unlawful expulsion from union membership. Thus, in *Wax* v. *International Mailers Union,* 400 Pa. 180, 161 A. 2d 603 (1960), the court refused to entertain jurisdiction in a case of that kind, relying partly on its view that the case before it was distinguishable from *Gonzales,* but partly also on its view that "the Gonzales decision has been almost entirely obliterated by the subsequent holding in the second Garmon case," 161 A. 2d at 608. See also *Baker* v. *Shopmen's Local No. 755,* 403 Pa. 31, 168 A. 2d 340 (1961).

A number of state courts, of course, have articulated the rule which appears to be the correct one: an employee may bring an action against his union under state law for wrongful expulsion from membership, and may recover, as an element of damages, compensation for the loss of his job if that was a consequence of the wrongful expulsion. He may not, however, sue the union where the crux of the action is that the union wrongfully obtained his discharge, since his exclusive remedy for unlawful interference by the union with his employment relationship—as distinguished from wrongful expulsion from membership—is under the National Labor Relations Act. *E.g., Fullerton* v. *International Sound Technicians,* 194 Cal. App. 2d 805 (1961); *Green* v. *Folks,* 13 App. Div. 2d 744, 215 N.Y.S. 2d 116 (1961).

This case is an unusually good vehicle for re-emphasizing the distinction between *Russell* and *Gonzales* on the one

hand and *Garmon* on the other. This case, unlike *Russell,* involved no violence. And, unlike *Gonzales,* the claim asserted by the plaintiff here was not for improper expulsion or discipline, but for tortious interference with the employment relationship. Both the first decision of the Supreme Court of Ohio and the trial judge's charge to the jury make that absolutely clear. (See Appendix A at p. 29; Tr. 424.) Thus, by granting review in this case, the Court would be able to clarify one of the few remaining areas in the law of federal pre-emption under the National Labor Relations Act which appears still to be confusiong to the state courts.

CONCLUSION

For the reasons stated, petitioners pray that this petition for certiorari be granted.

Respectfully submitted,

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Appendix A

First Round—Opinion of the Supreme Court of Ohio, July 2, 1958

[CAPTION OMITTED]

The appellant, Perko, brought two actions in the Court of Common Pleas to recover money damages for alleged wrongful interference with his right to work. In one action, Local No. 207 of International Association of Bridge, Structural and Ornamental Iron Workers Union, an unincorporated labor organization of which he was a member, and five individuals, officials of the union, were named defendants. In the other action, the same five named individuals were made defendants, but the union was not.

The material allegations of the petitions in the two actions are practically the same. Plaintiff alleges that for several years he was a member of the defendant union, classified as a foreman and employed as such by the William B. Pollock Company; that defendants, without justification, conspired to deprive plaintiff of his right to continue to work as foreman for the William B. Pollock Company and as foreman for any other company in the geographic jurisdiction of Local No. 207, by suspending his foreman's rights, by demanding that the Pollock company discharge plaintiff as superintendent and foreman and by instituting a strike against the Pollock company for the sole purpose of coercing the company to discharge him; that in consequence thereof plaintiff was discharged; and that defendants have prevented plaintiff from procuring employment as a foreman. The prayers are for money judgments for loss of earnings against defendants and each of them.

In each case the defendants filed a motion to dismiss the petition for the reason that the court does not have jurisdiction over the subject matter of the cause of action.

Without hearing any evidence, the trial court in each case sustained the motion and dismissed the petition.

The Court of Appeals affirmed the judgments.

The causes are in this Court for review, a motion to certify the record in each case having been allowed.

PER CURIAM:

Defendants contend that the petitions do not state a cause of action at common law; that there is presented an instance of a union member seeking a monetary award from the union to which he belongs and from its duly elected representatives, without alleging that he has exhausted the remedies provided by the constitution and bylaws of the union; and that a state court has no jurisdiction to award a judgment against a union or its representatives for money damages resulting from loss of employment caused by union activity proscribed as an unfair labor practice by the National Labor Relations Act, 29 U.S.C.A. § 151 et seq.

Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. He is not seeking reinstatement. He is not asking for equitable relief. He is alleging that the union to which he belonged and certain named officials thereof committed a common-law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment with the William B. Pollock Company, for which he asks money judgments.

To require the plaintiff to first exhaust his remedies provided by the constitution and bylaws of the defendant union, as contended by defendants, by appealing to the union, the one alleged to have committed the tort, to determine a monetary award for such tort, would be requiring a vain thing, especially since it has not been pleaded or established that the union has internal remedies available to plaintiff.

Neither is this court in accord with defendants' second contention that the state court is without jurisdiction to award judgments against them in the instant causes. The National Labor Relations Act does not give the National Labor Relations Board such exclusive jurisdiction over the

subject matter of an action to recover damages for a common-law tort, which is also an unfair labor practice proscribed by the act, as to preclude an appropriate state court from exercising jurisdiction. The federal act does not expressly or by implication deprive the plaintiff of his common-law right of action in tort for damages. *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* v. *Russell*, 356 U. S. 634, 78 S.Ct. 932, 2 L. Ed. 2d 1030, and *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 78 S.Ct. 923, 2 L.Ed. 2d 1018.

The trial court was in error in dismissing the petitions for want of jurisdiction.

Judgments reversed and causes remanded.

WEYGANDT, C. J., ZIMMERMAN, STEWART, TAFT, MATTHIAS, BELL, and HERBERT, JJ., concur.

Appendix B

Second Round—Decision of the Supreme Court of Ohio, June 1, 1960

[CAPTION OMITTED]

This same cause was here before as reported in 168 Ohio St. 161, 151 N.E. 2d 742. At that time the Court of Appeals had affirmed the judgment of the Court of Common Pleas, which sustained the motion to dismiss the petition on the ground that the trial court did not have jurisdiction of the subject matter of the cause of action. The judgment was reversed and the cause remanded for further proceedings.

Accordingly, it was tried on the original petition amended by leave of court so as to increase the amount of damages prayed for. An amended answer in the nature of a general denial was filed by the defendants. A jury was impaneled, and the presentation of testimony consumed four days. At the end of plaintiff's case, defendant union moved for a directed verdict in its favor on the ground "that there is no evidence to support the allegations in plaintiff's petition and that the acts committed by the defendant union are protected activities within the meaning of Section 7 of the National Labor Relations Act," which motion was overruled by the court. The motion for a directed verdict for the same reasons was renewed at the end of all the testimony and again overruled by the court. The cause was then submitted to the jury which deliberated for two and one-half days without arriving at a verdict. After reporting to the court that its members were unable to reach a decision on the verdict, the jury was discharged on October 21, 1958, the entry being journalized the following day. Prior to that the jury was twice told by the court, during its deliberations and upon inquiry by it, that if it could not agree the case would have to be retried by another jury.

On October 23, 1958, a motion, captioned "Motion for Judgment on Disagreement of Jury" was filed reading, "Defendant respectfully moves the court for judgment in its

favor, for the reason it is entitled by law to judgment upon the evidence received on the trial of this action, although the jury failed to reach a verdict and was discharged."

On January 28, 1959, the trial court sustained the motion and rendered judgment in favor of defendants. No opinion was rendered by the trial court setting forth the basis on which the motion was sustained and judgment entered for defendants. An appeal was prosecuted by plaintiff to the Court of Appeals, which court affirmed the judgment of the Court of Common Pleas, stating in its entry:

> "The court after careful consideration of the entire record finds that the plaintiff, appellant has not sustained the burden of proof resting upon him in support of the allegations contained in his petition and that the judgment of the trial court in sustaining the motion of the defendant, appellee for judgment on the evidence notwithstanding the failure of the jury to agree upon a verdict should be and the same is hereby affirmed."

The cause is before this Court upon the allowance of a motion to certify the record.

PER CURIAM:

Section 2323.18, Revised Code, provides, in part, as follows:

> "When upon the statements in the pleadings or upon the evidence received upon the trial, or both, one party is entitled by law to judgment in his favor, upon motion of such party, filed as provided in Section 2323.181 of the Revised Code, judgment shall be so rendered by the court although the jury may have failed to reach a verdict or a verdict has been rendered against such party and a judgment entered thereon, and whether or not a motion to direct a verdict has been made or overruled, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence."

The motion for judgment in the Court of Common Pleas was sustained upon the claim that the defendant "is entitled by law to judgment upon the evidence received on the trial" and the affirmance by the Court of Appeals was based on the finding that the plaintiff "has not sustained the burden of proof resting upon him in support of the allegations contained in his petition."

The finding of the trial court that the defendant "is entitled by law to judgment upon the evidence received on the trial" was not a finding that there was no evidence to support a judgment for the plaintiff. If the judgment was so intended the trial court could have made that finding. It should be noted that defendants' request for judgment at the end of plaintiff's evidence was overruled and, when renewed at the end of all the testimony, was again overruled. The jurisdiction of the trial court to hear this action was determined by this court in its prior decision, supra. See, also, *International Assn. of Machinists* v. *Gonzales,* 356 U. S. 617, 2 L. Ed. 2d 1018, 78 S. Ct. 923, and *International Union* v. *Russell,* 356 U. S. 634, 2 L. Ed. 2d 1030, 78 S. Ct. 932. This leaves us, therefore, only the question of evidence.

Obviously, the trial court was not of the opinion that there was no evidence to support the plaintiff's cause or it would have so ruled at the end of all the testimony, if not at the end of plaintiff's testimony. The only construction remaining to be resolved so far as the trial court's decision is concerned relates to the burden of proof and the affirmance of the trial court's judgment by the Court of Appeals on the ground that plaintiff had "not sustained the burden of proof resting upon him." That appellate court finding recognizes that the finding of the trial court was reached by weighing the evidence. The affirmance was without an accompanying opinion explaining or setting forth how defendant "was entitled by law to judgment in his favor."

Had the jury arrived at a verdict for either plaintiff or defendants the trial court would have been without authority

under Section 2323.18, Revised Code, quoted supra, to have rendered judgment for the adverse party on the basis of weight of the evidence. Upon such a finding, the trial court would have been required to grant a new trial. Had a verdict been found for either party and judgment entered accordingly, the Court of Appeals would have been without authority on appeal to enter final judgment for the adverse party or modify the trial court judgment (except as to remittitur) on the weight of the evidence.

The burden which rested upon the plaintiff in this case was to establish the material averments of his cause of action by a preponderance of all the evidence. *Ginn, Admr.* v. *Dolan,* 81 Ohio St. 121, 90 N.E. 141, 135 Am. St. Rep. 761; *Klunk* v. *Hocking Valley Ry. Co.,* 74 Ohio St. 125, 77 N.E. 752; 21 Ohio Jurisprudence 2d. 161 et seq., Section 154; *Brunny, Admx.* v. *Prudential Ins. Co.,* 151 Ohio St. 86, 93, 84 N.E. 2d 504.

The fact that no verdict was rendered by the jury because of its failure to agree does not deprive the parties of their respective rights to try the case again. The trial court could have entered its judgment only after finding that at the conclusion of all the testimony and after construing all the relevant and competent evidence adduced most strongly in the plaintiff's favor, it was in law not sufficient to warrant the relief prayed for in the petition of the plaintiff.

In the case of *Dick* v. *Railroad Co.,* 38 Ohio St. 289, at page 392, it is stated in the opinion:

> "If there was evidence tending to support the issue, the court below erred in arresting it from the jury. It is only, where no evidence is introduced by the plaintiff, tending to support the issue, or where it is such as to show clearly, that he has no cause of action, that it is the duty of the court, to direct judgment of nonsuit."

In the case of *Poske* v. *Mergl,* 169 Ohio St. 70, 157 N.E. 2d 344, this Court stated the rule in relation to "weight" or

"sufficiency" of the evidence, as a basis for a granting of a new trial. Paragraph one of the syllabus is as follows:

> "Where the evidence in the trial of a case is such that the case must be submitted to a jury to find for either the plaintiff or defendant, and where the trial court after its review of the evidence on a motion for a new trial is convinced that there is insufficient credible evidence to sustain a judgment upon the verdict of the jury, such court may, in its discretion, grant not more than one new trial for that reason."

The finding by the trial court that judgment should be rendered "upon the evidence received on the trial" is insufficient to authorize judgment for the defendants and the finding of the Court of Appeals that plaintiff "has not sustained the burden of proof resting upon him in support of the allegations in his petition" is likewise insufficient. The judgment must, therefore, be reversed and the cause remanded to the Court of Common Pleas for a new trial.

Judgment reversed.

WEYGANDT, C. J., MATTHIAS, BELL and HERBERT, JJ., concur.

ZIMMERMAN, TAFT and PECK, JJ., dissent.

Appendix C

Third Round—Opinion of the Court of Appeals, Seventh District, Mahoning County, Ohio, March 6, 1962

[CAPTION OMITTED]

DONAHUE, J.

This case comes before this court for the third time.

On the first occasion the Supreme Court in *Perko* v. *Union,* 168 Ohio St. 161, held that the petition stated a cause of action under the common law.

On the second occasion the Supreme Court in *Perko* v. *Union,* 171 Ohio St. 68, in a per curiam opinion, said that the common pleas court in granting judgment for defendant after a disagreement by the jury, had failed to explicitly find that there was no evidence to support a judgment for plaintiff and, therefore, could not enter judgment for defendant.

On this, the third occasion, we find a jury verdict for plaintiff.

The petition in this case alleges a conspiracy by the union and its members to keep plaintiff from working as a foreman or superintendent. When this cause arose, plaintiff had been a superintendent for The William B. Pollock Company in connection with blast furnace repair and construction. Difficulties between Ironworkers and Boilermakers were being ironed out, when plaintiff was accused, as an Ironworker, of aiding Boilermakers in learning Ironworker's work, in contravention to the Ironworkers' rules and constitution.

At a Union trial, he pled guilty and was fined. Said fine was later suspended by the International.

Following this trial, the small group of iron workers on the job plaintiff was supervising, refused to take orders. No work stoppage occurred, since the orders were given by bypassing plaintiff and giving orders directly to foremen. Plaintiff continued on the job in other respects, was paid to the end of the job's contract. He suffered no financial loss

because of the Ironworkers' conduct. In fact he continued to draw pay for some weeks after this contract's completion.

Evidence shows that when a contractor had a job contract, such as Pollock's had above, they could hire Ironworkers directly, or could call the Union who would furnish the necessary men. However, the contractor and the contractor alone had the privilege of picking the superintendents and foremen. The foremen generally had to have Union Books but superintendents did not. Under the union contract with the contractors, the union had no control over the picking or employment of foremen or superintendents. Therefore there could be no such thing as "foremen's rights" as such.

From the evidence, it appears that at no subsequent time did plaintiff, who was about 68 at that time, ever secure a job as foreman or superintendent. He in each of several subsequent years, did work, as an ironworker, but his employment was always terminated before he earned $1,200.00 in any year. He was also on social security.

The evidence given by plaintiff indicates that he talked to a number of contractors, albeit somewhat vaguely, about his "foreman's rights." It would seem that he had a habit on these occasions of advising the contractor or superintendent that his "foreman's rights" had been suspended.

Only one representative of a contractor, Francis Walsh, of Pollocks indicated that he had ever contacted the Union with regard to these "foreman's rights." He testified that as the result of these contacts, he believed that he would run into troubles if he hired plaintiff.

This is the only testimony which supports plaintiff's claims in any respect.

Defendant is before us on twenty-three assignments of error. For their own convenience, counsel has argued them under five "arguments."

For our convenience we will consider the salient points raised.

Defendant maintains the acts alleged are protected under

the National Labor Relations Act, Section 7. The question as to whether the petition in this case states a common law cause of action was disposed of, as we show above, in *Perko* v. *Union,* 168 Ohio St. 161. It is continually urged, however, that that phase of this case did not consider the question of the protection afforded by Section 7.

It is true that Section 7 protects the men and union when they organize for, among other things, "other mutual aid or protection." But we see nothing in these words which allow them to commit illegal or unlawful acts or act toward an illegal or unlawful goal or for unjustifiable conduct to attain a goal. This is what is required for a recovery in this action, and if it exists, then the Common Law action is not eliminated.

The second point raised is as to the sufficiency of the evidence to take the case to the jury. We agree that with all the testimony, there is very little that supports the cause sued on here. And yet we cannot say, as the trial court apparently could not say, that there was no evidence to support a judgment for plaintiff. Under the ruling in the second *Perko* v. *Union* appeal, 171 Ohio St. 68, to support a directed verdict, the trial court would have had to so find. We are bound by this case.

We find no other error or "argument" to be prejudicial to defendant.

Judgment affirmed.

BROWN, P. J., Concurs.

GRIFFITH, J., Concurs.

Appendix D

Third Round—Order of Supreme Court of Ohio, July 5, 1962

This cause, hereby on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the plaintiff-appellee recover from the defendants-appellants his costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.